

Interlocutory Orders, Etc.

IN THE MATTER OF

**HEALTH RESEARCH LABORATORIES, LLC.,
WHOLE BODY SUPPLEMENTS, LLC.,
AND
KRAMER DUHON***Docket No. 9397. Order, November 19, 2021*

Order denying either a final or summary decision, remanding the case to the FTC Administrative Law Judge, and allowing the Complaint Counsel to amend the complaint.

ORDER DENYING FINAL DECISION UNDER RULE 3.12(B)(2) AND DENYING SUMMARY DECISION

The Complaint in this case alleges that Health Research Laboratories, LLC (“HRL”), Whole Body Supplements, LLC (“WBS”), and their owner Kramer Duhon (collectively, “Respondents”) violated the Federal Trade Commission Act by making unsubstantiated health claims concerning their Black Garlic Botanicals, BG18, The Ultimate Heart Formula (“UHF”), and Neupathic products. Respondents seek a final decision and order under Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2), based on their purported admission of all material facts in the Complaint, while Complaint Counsel seek summary decision under Commission Rule 3.24, 16 C.F.R. § 3.24. We find that significant questions of material fact remain in dispute which make the case inappropriate for either a summary decision or a decision under Rule 3.12(b)(2). Therefore, this matter will be remanded to the Chief Administrative Law Judge (“ALJ”) for additional discovery, evidentiary hearing, and initial decision, consistent with our opinion below. Before remanding, however, we will provide opportunity for Complaint Counsel to move to amend the Complaint.

I. PROCEDURAL HISTORY**A. The Complaint**

On November 13, 2020, the Commission issued an administrative Complaint charging HRL, WBS, and Kramer Duhon, individually and as an owner and officer of the aforementioned companies, with violating Sections 5(a) and 12 of the FTC Act. The Complaint alleges that HRL’s and WBS’s advertisements conveyed expressly or by implication, and without substantiation, claims that the Black Garlic Botanicals, BG18, and UHF products: (a) prevent or reduce the risk of and treat cardiovascular disease, including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque; (b) prevent or reduce the risk of and treat atherosclerosis, including by reducing cholesterol or decreasing arterial plaque; and (c) cure, treat, or mitigate hypertension, including by decreasing arterial plaque or lowering blood pressure. Complaint ¶¶ 14-19. The Complaint also alleges that HRL’s advertisements conveyed expressly or by implication, and without substantiation, claims that the Neupathic dietary supplement cures, treats, or mitigates diabetic neuropathy, including by improving blood circulation, or eliminating or alleviating diabetic nerve pain and discomfort. *Id.* ¶¶ 20-21. To support these claims, the

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Complaint attaches and extensively quotes from promotional mailers sent by Respondents to consumer residences. See *id.* ¶¶ 7, 9, 11, 13. The Complaint also includes a Notice of Contemplated Relief, which contains various prohibitions on representations, record-keeping and notice requirements, and other fencing-in provisions. *Id.* at 14-15.

B. Proceedings before the ALJ

On December 4, 2020, Respondents filed an Answer denying the alleged violations and asserting a variety of defenses. On February 12, 2021, Respondents moved for leave to amend their Answer to admit all of the material allegations pursuant to Commission Rule 3.12(b)(2), which provides:

If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46.

16 C.F.R. § 3.12(b)(2).

Complaint Counsel opposed the motion, arguing among other things that Respondents' proposed amendments to the Answer did not conform to the requirements of Rule 3.12(b)(2) because Respondents continued to assert defenses that contested material facts, namely the defenses of mootness and lack of public interest. Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint at 5 (Feb. 24, 2021). Complaint Counsel also argued that, should the ALJ grant Respondents leave to amend the Answer, he should require Respondents to admit the allegations on a paragraph-by-paragraph basis and permit discovery on any remaining factual issues. *Id.* at 6-7. Further, Complaint Counsel cross-moved for leave to amend the Complaint to add allegations related to the factual issues raised by Respondents' defenses and the scope of relief. *Id.* at 7. The proposed amendments included, among other things, two new paragraphs concerning the lack of substantiation for Respondents' health claims. See *id.* Ex. CCX-A ¶¶ 6, 23; see also Respondents' Response to Cross Motion to Amend Complaint at 2-4 (Feb. 26, 2021) (listing Complaint Counsel's proposed new and revised paragraphs). With respect to the scope of relief, Complaint Counsel explained that, as they had already informed Respondents, they would be seeking to ban Respondents from the supplement industry. Complaint Counsel's Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint at 8 n.3. Complaint Counsel stated that they wanted to amend the Complaint to "support the broad relief Complaint Counsel seeks." *Id.* at 7.

The next day, Respondents submitted a waiver of the defenses of mootness and lack of public interest, which Complaint Counsel had identified as raising factual issues. Respondents' Waiver of Affirmative Defenses of Mootness and Lack of Public Interest (Feb. 25, 2021).

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Respondents then argued that, in light of this waiver, there was no need for Complaint Counsel to amend the Complaint to add factual allegations concerning those defenses. See Respondents' Response to Cross Motion to Amend Complaint at 6. As for the proposed factual allegations addressing the appropriate relief, Respondents stated that "[t]he scope of relief provided by the FTC Act is a pure question of law, not a factual issue that needs to be alleged." *Id.* Thus, they asserted, "there are no outstanding factual issues that justify the proposed amendments." *Id.*

On March 10, 2021, the ALJ granted Respondents leave to amend the Answer and, on March 12, 2021, denied Complaint Counsel's cross-motion to amend the Complaint. The ALJ found that Complaint Counsel's proposed amendments did not add new legal theories or allege new or different violations of the FTC Act but would nonetheless complicate resolution of the case on the merits and "unnecessarily frustrate the right to obtain expedited proceedings under Rule 3.12(b)(2)[,]" since Respondents had admitted all of the material allegations in the existing Complaint. Order Denying Complaint Counsel's Motion to Amend the Complaint at 5. The ALJ further determined that "a paragraph-by-paragraph response to each allegation of the Complaint was not contemplated by Rule 3.12(b)(2) and could create ambiguity, when the proposed amended answer already expressly admits 'all material allegations' of the Complaint." Order Granting Respondents' Motion for Leave to Amend Answer at 4-5. On the issue of discovery, the ALJ held that nothing in Rule 3.12(b)(2) prohibited Complaint Counsel from pursuing discovery regarding issues that remained relevant after the amendment of the Answer. *Id.* at 5. Complaint Counsel moved the ALJ to certify his rulings on the parties' motions for interlocutory appeal to the Commission, but the ALJ denied certification. See Complaint Counsel's Motion to Certify Rulings for Interlocutory Appeal (Mar. 29, 2021); Order Denying Motion for Interlocutory Appeal (Apr. 2, 2021).

On March 30, 2021, Respondents filed an Amended Answer stating: "Pursuant to 16 CFR § 3.12(b)(2), Respondents elect not to contest the allegations of fact set forth in the complaint. Respondents admit all of the material allegations to be true." Amended Answer at 1. Respondents also reserved the right to submit proposed findings of fact and conclusions of law. *Id.* The sole remaining defense asserted that the FTC's administrative process and structure violates the Constitution. *Id.* 1-2.

The next day, on March 31, 2021, Respondents filed a motion asking the ALJ to either issue a new scheduling order setting out the deadlines for final briefing or transfer the case to the Commission for issuance of a final decision. *See generally* Expedited Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission. Complaint Counsel opposed the motion because it would terminate discovery regarding the appropriate relief, an issue that remained in dispute despite the admissions in the Amended Answer. Opposition to Respondents' Expedited Motion to Enter New Scheduling Order or, in the Alternative, Transfer Case to the Commission at 1-2 (Apr. 9, 2021). Just three days earlier, the ALJ had ordered Respondents to provide discovery relating to the appropriate fencing-in relief, including the seriousness and deliberateness of Respondents' conduct. Order Granting Complaint Counsel's Motions to Compel (Apr. 6, 2021). On April 13, 2021, Respondent submitted a stipulation stating that "Respondents hereby stipulate and agree that the Initial Decision of the ALJ can include whatever 'fencing in' relief is permitted by statute and requested in the Complaint." Respondents'

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Stipulation as to “Fencing-In” Relief at 1-2. Respondents also asked the ALJ to reconsider his discovery order, asserting that there was no need for additional discovery because they had “admitted all material facts in the Complaint and agreed to the ‘fencing in’ relief.” Respondents’ Expedited Motion to Partially Reconsider May [sic] 6 Order Granting Complaint Counsel’s Motions to Compel and Statement of Impasse at 4 (Apr. 13, 2021).¹ In light of Respondents’ admissions in the Amended Answer and concessions on fencing-in relief, the ALJ held that discovery was now moot and transferred the case to the Commission for a final decision and order under Rule 3.12(b)(2). Order Granting in Part and Denying in Part Respondents’ Motion to Enter New Scheduling Order or, in the Alternative, to Transfer the Case to the Commission at 5 (Apr. 20, 2021).

C. Proceedings before the Commission

To determine the appropriate next steps following transfer and ascertain whether any factual issues remained to be resolved, on May 14, 2021, the Commission directed the parties to submit filings identifying any additional material facts that they intended to assert, listing the decisional issues to which each asserted additional fact related, stating whether they disputed the facts identified by the other party, and explaining the basis for any such dispute. Order for Further Proceedings before the Commission (May 14, 2021) (“Order for Further Proceedings”). The Commission also asked Respondents to clarify their position on the items in the Notice of Contemplated Relief, as the Respondents’ prior stipulation had been limited to fencing-in relief that would be ordered by the ALJ.

Complaint Counsel’s submission repeated numerous allegations from the Complaint, including allegations regarding Respondents’ representations and lack of substantiation, and listed a number of additional facts they sought to introduce from outside the Complaint relating to the scope of relief. See Complaint Counsel’s Statement of Additional Material Facts, Att. A (May 25, 2021). Respondents’ submission did not identify any additional facts they intended to introduce and did not indicate a substantive dispute with the additional facts submitted by Complaint Counsel. Respondents’ Response to Complaint Counsel’s Statement of Additional Material Facts (June 1, 2021). Respondents asserted, however, that Complaint Counsel’s recitation of allegations in the Complaint was outside the scope of the Commission’s May 14 order, which asked for facts other than those expressly alleged in the Complaint, and stated that Respondents would not be responding to that part of the Complaint Counsel’s submission. *Id.* at 5-6. Respondents also raised a number of objections to allowing material facts beyond the Complaint. Most notably, Respondents argued that Complaint Counsel’s factual assertions must be excluded as irrelevant because only legal issues remained in the case. *Id.* at 12-13. Respondents stated that “[a]ll material facts in the live Complaint have been admitted, so it is not necessary to add ‘additional facts’ to prove any of the facts in the Complaint.” *Id.* at 12. Further, they asserted that allowing Complaint Counsel to rely on facts outside the Complaint would be inconsistent with Rule 3.12(b)(2) and the Commission’s related explanatory statement in the Federal Register. *Id.* at 13. Respondents also

¹ Respondents also stated that “Respondents have no objection to a *blanket* prohibition on disseminating or causing to be disseminated *any* advertising or promotional materials for *any* supplements that makes *any* representations regarding health or disease.” *Id.* at 7.

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clarified, per the Commission's request, that they have "agree[d] and accept[ed]" the remedies in the Notice of Contemplated Relief, subject only to two purely legal objections regarding constitutionality and the FTC's authority to impose affirmative remedial requirements. *Id.* at 7-8.

In a July 30, 2021 order, the Commission rejected Respondents' objections to the introduction of facts beyond the Complaint. The Commission found that Complaint Counsel's factual assertions regarding the scope of relief were not irrelevant because Complaint Counsel had indicated they intended to seek to ban Respondents from the supplements industry, and Respondents had not conceded the appropriateness of such a ban. Order Directing Parties to Submit Proposed Findings of Fact and Conclusions of Law and Providing for Summary Decision Proceedings at 2. The Commission also explained that Rule 3.12(b)(2) does not prohibit the Commission from considering facts outside the pleadings in rendering a final decision. *Id.* at 3. The Commission ruled that any party that wished to rely on facts outside the pleadings could invoke summary decision procedures, similar to the process used by federal courts in analogous circumstances. *Id.* at 4. Accordingly, we directed the parties to file their proposed findings of fact and conclusions of law and supporting documents as indicated in Commission Rule 3.12(b)(2) and, if a party chose to rely on facts outside the Complaint and found summary decision appropriate, a statement of material facts as to which there is no genuine issue for trial and supporting documents, per the Commission's summary decision procedures.

The parties filed their initial submissions on August 20, 2021. Respondents' proposed findings of fact consisted of four short statements summarizing the Complaint and Respondents' admissions and concessions. Respondents' Findings of Fact and Conclusions of Law at 2-3. Complaint Counsel, on the other hand, submitted a statement of material facts citing the Complaint as well as sources outside the Complaint, with the effect of converting their filing into a motion for summary decision. *See generally* Complaint Counsel's Proposed Findings of Fact, Statement of Material Facts as to Which There is No Genuine Issue, and Proposed Conclusions of Law ("Complaint Counsel's Proposed Findings and Statement of Material Facts").

On September 10, 2021, Respondents filed their opposition to Complaint Counsel's motion for summary decision. Respondents contested a number of Complaint Counsel's factual statements, including some key propositions that appeared as allegations in the Complaint. The disputed allegations included (1) that Respondents' advertisements represented that their products prevented, reduced the risk of, treated, or mitigated certain diseases or health concerns, and (2) that those representations were not substantiated at the time they were made. Respondents' Opposition to Summary Disposition and Reply Findings of Fact, Conclusions of Law, and Brief at 13-14 ("Opposition to Summary Disposition") (disputing proposed findings of fact ¶¶ 23, 33, 34, 42, 43, 50, 59, 67, which cited *inter alia* Complaint ¶¶ 14-21). Respondents claimed that their Amended Answer had not admitted these allegations because they were "in the legal counts, not the allegations of fact, of the Complaint." *Id.* Respondents also took issue with Complaint Counsel's assertions regarding the intent and deliberateness of any violation. *Id.* at 17-18, Ex. RX1. Respondents sought to submit evidence of their compliance with the FTC's requests and of substantiation of their product claims. *Id.*

On reply, Complaint Counsel argued that the Commission should disregard Respondents' late factual contentions and issue a final decision based on Respondents' prior admissions and the undisputed facts previously set forth by Complaint Counsel. Complaint Counsel's Response to

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Respondents' September 10, 2021 Submission at 1 (Oct. 8, 2021). Complaint Counsel requested that if the Commission determined to permit Respondents to withdraw or limit their Rule 3.12(b)(2) admissions, Complaint Counsel be given an opportunity to move to amend the Complaint before any remand.

II. ANALYSIS

"An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer's purchasing decision." *In re POM Wonderful LLC*, 2013 WL 268926, at *18 (FTC Jan. 16, 2013), *aff'd sub nom. POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *see also, In re California Naturel, Inc.*, 2016 WL 7228668, at *5 (FTC Dec. 5, 2016); *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984), appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). Thus, in determining whether an advertisement is deceptive, the Commission considers (1) what claims are conveyed in the ad; (2) whether those claims are false or misleading; and (3) whether the claims are material. *In re Traffic Jam Events*, 2021 WL 5124183, at *12 (FTC Oct. 25, 2021); *California Naturel*, 2016 WL 7228668, at *5. Misleading claims include those that are not substantiated at the time they are disseminated. *See, e.g., ECM BioFilms, Inc.*, 160 F.T.C. 652, 709 (2015) ("Because an objective claim about a product's performance or efficacy carries with it the express or implied representation that the advertiser had a reasonable basis to substantiate the claim, failure to have a reasonable basis is misleading."), *aff'd sub nom., ECM BioFilms, Inc. v. FTC*, 851 F.3d 599 (6th Cir. 2017); *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984) (advertisers must "have a reasonable basis for advertising claims before they are disseminated").

Here, the Complaint alleges that Respondents' advertisements conveyed that Black Garlic Botanicals, BG18, and UHF products prevent or reduce the risk of and treat cardiovascular disease, prevent or reduce the risk of and treat atherosclerosis, and cure, treat, or mitigate hypertension. Complaint ¶¶ 14, 16, and 18. The Complaint also alleges that HRL's advertisements conveyed that Neupathic cures, treats, or mitigates diabetic neuropathy. *Id.* ¶ 20. Further, the Complaint alleges that these claims were not substantiated at the time they were made. *Id.* ¶¶ 15, 17, 19, 21. Respondents now challenge these core allegations of the Complaint, while urging that, pursuant to Commission Rule 3.12(b)(2), the Commission enter a cease and desist order limited to prohibiting the acts or practices alleged in the Complaint on the basis of the Complaint and the Amended Answer. 2 Complaint Counsel have requested a summary decision, pursuant to Commission Rule 3.24 and our order dated July 30, 2021, that Respondents have engaged in deceptive advertising.

2 Opposition to Summary Disposition at 31. Alternatively, Respondents request in one clause of a single sentence in the concluding paragraph of their Opposition to Summary Disposition that the Commission dismiss the Complaint. *Id.* Prior to that, Respondents had steadfastly maintained that the Commission should issue a final decision under Rule 3.12(b)(2). *See, e.g.,* Respondents' Response to Complaint Counsel's Statement of Additional Material Facts at 16 (June 1, 2021) ("Respondents respectfully request that the Commission issue a cease and desist order based on the facts alleged in the November 13, 2020 Complaint"). The case was transferred to the Commission based on Respondents' admissions under Rule 3.12(b)(2), and Respondents have not filed a motion to dismiss. Under these circumstances, consideration of dismissal is not appropriate.

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Rule 3.12(b)(2) applies when a respondent “elects not to contest the allegations of fact set forth in the complaint.” 16 C.F.R. § 3.12(b)(2). Although Respondents’ Amended Answer states that they admit all of the material allegations in the Complaint, Respondents now assert that allegations regarding what claims were conveyed by the ads and the lack of substantiation have not been admitted and are in fact contested. Opposition to Summary Disposition at 13-14. The allegations that Respondents made health claims without substantiation are factual and essential; without them, the Complaint would not state a cause of action. If Respondents do not admit these allegations, then they do not admit the material allegations of fact in the Complaint, and the matter is not appropriate for Rule 3.12(b)(2) disposition.

The case is also not appropriate for summary decision under Rule 3.24, which provides standards analogous to those for motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re McWane, Inc. & Star Pipe Prods., Ltd.*, 2012 WL 4101793, at *5 (FTC Sept. 14, 2012); *In re Polygram Holding, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002). A party moving for summary decision must show that “there is no genuine issue as to any material fact” and that it is “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); 16 C.F.R. § 3.24(a)(2).

Complaint Counsel urge us to disregard Respondents’ late-claimed factual disputes and issue a final decision based on Respondents’ admissions in the Amended Answer and concessions in other filings. While there may be some justification for Complaint Counsel’s arguments, we find it more appropriate to accept Respondents’ current, clear statements that they dispute the material allegations at issue, and we will allow them an opportunity to contest the disputed issues. Respondents are now asserting that they have not admitted a lack of substantiation, thereby depriving Complaint Counsel of their asserted proof that substantiation was absent³ and precluding summary decision on the central issue of substantiation. Although we might be able to ascertain the claims conveyed by Respondents’ advertisements from materials in the summary decision record, we are concerned that, as a result of Respondents’ perceived admissions, the issue has not yet been squarely joined. We find it preferable to make the determination of what claims were conveyed after thorough briefing, without the overlay of the purported admissions. Accordingly, we will remand this proceeding to the ALJ for discovery and trial.

We are, however, deeply troubled by Respondents’ counsel’s gamesmanship and tactics. Their misleading assertions to the ALJ and the Commission regarding the scope and effect of Respondents’ Amended Answer have delayed the case by months and have wasted many hours of attorney time and agency resources. Time and again, Respondents claimed that there was no factual dispute and no need for further fact development because all material facts in the Complaint had been admitted. Respondents opposed Complaint Counsel’s motion to amend the Complaint, which would have included among other things two new paragraphs regarding the lack of substantiation for Respondents’ health claims,⁴ on grounds that “Respondents have admitted all material facts in the Complaint” and “none of the new facts are necessary to obtain a cease-and-desist order.” Respondents’ Response to Cross Motion to Amend Complaint at 8-9; *see also id.* at 6 (“[T]here

³ See Complaint Counsel’s Proposed Findings and Statement of Material Facts ¶¶ 33, 42, 50, 67 (relying solely on the Amended Answer to demonstrate that substantiation was absent).

⁴ See Complaint Counsel’s Opposition to Motion to Amend Answer and Cross Motion to Amend Complaint, Ex. CCX-A ¶¶ 6, 23.

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are no outstanding factual issues that justify the proposed amendments”). They argued that, in light of their admissions, discovery was not only unnecessary but would be “manifestly unjust.” Respondents’ Expedited Motion to Partially Reconsider May [sic] 6 Order Granting Complaint Counsel’s Motions to Compel and Statement of Impasse at 4 (Apr. 13, 2021). When the Commission specifically instructed Respondents to identify any factual assertions in dispute, Respondents not only failed to indicate that they disputed any of Complaint Counsel’s factual assertions but reiterated that all material allegations in the Complaint had been admitted and, on that basis, argued that factual assertions beyond the Complaint were irrelevant. *See* Respondents’ Response to Complaint Counsel’s Statement of Additional Material Facts at 12 (“All material facts in the live Complaint have been admitted, so it is not necessary to add ‘additional facts’ to prove any of the facts in the Complaint.”); *id.* at 4 (“[T]he only ‘live’ factual issues in this case are the facts in the November 13, 2020 Complaint—all of which have been admitted[.]”).

Now, in a responsive brief following their own request for a final decision under Rule 3.12(b)(2), Respondents claim that their Amended Answer did not actually admit the Complaint’s paramount allegations – those that allege that Respondents made unsubstantiated health claims. *See* Opposition to Summary Disposition at 13-14. Respondents claim that the Amended Answer did not admit these allegations because they were “included in the legal counts, not the allegations of fact, of the Complaint.” *Id.* at 13 (emphasis omitted). The suggestion that any text under the heading of “Count” is by definition “legal” and not factual is patently erroneous. Indeed, federal courts have specifically required counts to contain allegations of fact. *See, e.g., Samuels v. WMC Mortg., LLC*, No. 620CV1441ORL37LRH, 2021 WL 3054836, at *2 (M.D. Fla. Feb. 2, 2021) (“[E]ach count must contain allegations showing the factual basis for that particular count.”); *Menard v. Miami-Dade Cty.*, No. 19-21268-CIV, 2019 WL 4247627, at *3 (S.D. Fla. Sept. 6, 2019) (Count must include “specific factual allegations to support the particular claim asserted in that count”); *George Shapiro v. Suga*, No. CV164068ESMAH, 2016 WL 3951379, at *2 (D.N.J. July 21, 2016) (“[A] properly pleaded complaint must contain, under each count . . . the specific factual allegations that would permit the court to draw the reasonable inference that the identified defendant or defendants are liable for that cause of action.”); *Swift v. Pandey*, No. CIV.A. 13-649 JLL, 2013 WL 3336768, at *3 (D.N.J. July 2, 2013) (“Although there may be circumstances in which it is appropriate to incorporate certain allegations by reference, there is no question that each count of a properly pled complaint *must* contain: (a) its own cause of action against a clearly identified defendant(s), and (b) those particular factual allegations that would allow the court to draw the reasonable inference that the defendant is liable for that cause of action.”). Thus, the sole explanation now offered in limiting the reach of Respondents’ admissions is unsustainable.

In light of Respondents’ repeated misrepresentations regarding their positions and intentions, the ALJ should consider on remand whether Respondents’ counsel should be suspended or barred from participating in this proceeding under Commission Rule 3.42(d), 16 C.F.R. § 3.42(d), for dilatory and obstructionist conduct.

Before remanding the case, however, we will address Complaint Counsel’s request to amend the Complaint. *See* Complaint Counsel’s Response to Respondents’ September 10, 2021 Submission at 20. Complaint Counsel previously moved the ALJ to amend the Complaint to add factual allegations, but the ALJ, despite finding that the amendments sought did not add new legal

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theories or allege new or different violations of the FTC Act, denied the motion and the request for certification for interlocutory appeal in reliance on Respondents' admissions and invocation of Rule 3.12(b)(2). Since Respondents contest factual allegations in the Complaint, however, Rule 3.12(b)(2) is inapplicable. Moreover, Respondents have argued that the Complaint does not provide sufficient notice of the relief sought. Accordingly, we will provide an opportunity for Complaint Counsel to move to amend the Complaint, including the Notice of Contemplated Relief.⁵

Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel may file with the Commission a motion to amend the Complaint by no later than December 1, 2021; and

IT IS FURTHER ORDERED that, within ten days after service of a motion filed pursuant to the preceding ordering paragraph, Respondents may file a response to the motion.

By the Commission.

⁵ We note, however, that the appropriate remedy is determined by the unlawful practices actually found to exist, not by the allegations of the complaint. *Zale Corp.*, 77 F.T.C. 1635, 1636 (1970).

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IN THE MATTER OF

**DTE ENERGY COMPANY,
ENBRIDGE, INC.,
AND
NEXUS GAS TRANSMISSION, LLC.**

Docket Number C-4691. Order, November 23, 2021

Order to reopen and modify the order where DTE Energy Company's successor, DT Midstream, Inc., will fulfill the obligations of the order.

ORDER REOPENING AND MODIFYING ORDER

DTE Energy Company ("DTE") submitted a petition to the Commission on September 21, 2021, to request that the Decision and Order ("Order") in this matter be set aside as to it, and continue as to its successor, DT Midstream, Inc. DTE bases its request on the fact that it spun off its non-utility natural gas pipeline, storage, and gathering business, including its ownership interest in Respondent NEXUS Gas Transmission, LLC ("Nexus"), to DT Midstream. DTE no longer has any natural gas pipeline transportation assets or business in the area addressed by the Order, i.e., Lucas, Ottawa, and Wood counties in northwest Ohio ("Relevant Area"). DT Midstream, a standalone publicly traded company, acknowledges itself as successor of DTE for purposes of complying with the Order.

DTE's petition was available for public comment for thirty days until November 5, 2021, and no public comments were filed. For the reasons stated below, the Commission has determined to grant DTE's petition and reopen and modify the Order as requested.

I. BACKGROUND

The Commission issued the Order on November 21, 2019, to remedy the anticompetitive effects resulting from Nexus's acquisition of Generation Pipeline LLC ("Generation") from North Coast Gas Transmission LLC ("NCGT") and its joint owners. DTE held a 50% ownership interest in Nexus at the time of the transaction. The Commission did not find the transaction to substantially lessen competition in natural gas pipeline transportation. However, the Commission found that a non-compete provision in the parties' purchase agreement unreasonably restrained trade by prohibiting NCGT from competing for new natural gas pipeline transportation business in the Relevant Area three years post-close.

Nexus, along with its parents at the time, DTE and Enbridge, were named as Respondents to the Order. The Order addressed the concern relating to the non-compete by requiring the parties to remove the provision from the purchase agreement, and the parties to the agreement executed an amendment that eliminated the non-compete prior to closing of Nexus's acquisition of Generation. The Order also prohibits Respondents from entering into, enforcing, or soliciting any